THE REPORT

THIS ISSUE
TRIAL BY JURY
65-Pages

Chapter I.

The Right of Juries to Judge of the Justice of Laws.

Section I.

For more than six hundred years - that is, since Magna Carta, in 1215 -there has been no clearer principle of English or American constitutional law, than that, in criminal cases, it is not only the right and duty of juries to judge what are the facts, what is the law, and what was the moral intent of the accused; but that it is also their right, and their primary and paramount duty, to judge the justice of the law, and to hold all laws invalid, that are, in their opinion, unjust or oppressive, and all persons guiltless in violating, or resisting the execution of, such law.

Unless such be the right and duty of jurors, it is plain that, instead of juries being a "palladium of liberty" - a barrier against the tyranny and oppression of the government - they are really mere tools in its hands, for carrying into execution any injustice and oppression it may desire to have executed.

But for their right to judge the law, and the justice of the law, juries would be no protection to an accused person, even as to matters Of fact; for, if the government can dictate to a jury any law whatever, in a criminal case, it can certainly dictate to them the laws of evidence. That is, it can dictate what evidence is admissible, and

what inadmissible, and also what force or weight is to be given to the evidence admitted. And if the government can thus dictate to a jury the laws of evidence, it can not only make it necessary for them to convict on a partial exhibition of the evidence rightfully pertaining to the case, but it can even require them to convict on any evidence whatever that it pleases to offer them.

That the rights and duties of jurors must necessarily be such as are here claimed for them, will be evident when it is considered what the trial by jury is, and what is its object.

"The trial by jury," then, is a "trial by the country" - that is, by the people - as distinguished from a trial by the government.

It was anciently called "trial per pais" - that is, "trial by the country." And now, in every criminal trial, the jury are told that the accused "has, for trial, put himself upon the country; which country you (the jury) are."

The object of this trial "by the country," or by the people, in preference to a trial by the government, is to guard against every species of oppression by the government. In order to effect this end, it is indispensable that the people, or "the country," judge of and determine their own liberties against the government; instead of the government's judging of and determining its own powers over the people. How is it possible that juries can do anything to protect the liberties of the people against the government; if they are not allowed to determine what those liberties are?

Any government, that is its own judge of, and determines authoritatively for the people, what are its own powers over the people, is an absolute government of course. It has all the powers that it chooses to exercise. There is no other - or at least no more accurate - definition of a despotism than this.

On the other hand, any people, that judge of, and determine authoritatively for the government, what are their own liberties against the government, of course retain all the liberties they wish to enjoy. And this is freedom. At least, it is freedom to them; because, although it may be theoretically imperfect, it, nevertheless, corresponds

to their highest notions of freedom.

To secure this right of the people to judge of their own liberties against the government, the jurors are taken, (or must be, to make them lawful jurors,) from the body of the people, by lot, or by some process that precludes any previous knowledge, choice, or selection of them, on the part of the government.

This is done to prevent the government's constituting a jury of its own partisans or friends; in other words, to prevent the government's packing a jury, with a view to maintain its own laws, and accomplish its own purposes.

It is supposed that, if twelve men be taken, by lot, from the mass of the people, without the possibility of any previous knowledge, choice, or selection of them, on the part of the government, the jury will be a fair epitome of "the country" at large, and not merely of the party or faction that sustain the measures of the government; that substantially all classes of opinions, prevailing among the people, will be represented in the jury; and especially that the opponents of the government, (if the government have any opponents,) will be represented there, as well as its friends; that the classes, who are oppressed by the laws of the government, (if any are thus oppressed,) will have their representatives in the jury, as well as those classes, who take sides with the oppressor - that is, with the government.

It is fairly presumable that such a tribunal will agree to no conviction except such as substantially the whole country would agree to, if they were present, taking part in the trial. A trial by such a tribunal is, therefore, in effect, "a trial by the country." In its results it probably comes as near to a trial by the whole country, as any trial that it is practicable to have, without too great inconvenience and expense. And, if unanimity is required for a conviction, it follows that no one can be convicted, except for the violation of such laws as substantially the whole country wish to have maintained. The government can enforce none of its laws, (by punishing offenders, through the verdicts of jurors,) except such as substantially the whole people wish to have enforced. The government, therefore, consistently with the

trial by jury, can exercise no powers over the people, (or, what is the same thing, over the accused person, who represents the rights of the people,) except such as substantially the whole people of the country consent that it may exercise. In such a trial, therefore, "the country," or the people, judge of and determine their own liberties against the government, instead of the government's judging of and determining its own powers over the people.

But all this "trial by the country" would be no trial at all "by the country," but only a trial by the government, if the government could either declare who may, and who may not, be jurors, or could dictate to the jury anything whatever, either of law or evidence, that is of the essence of the trial.

If the government may decide who may, and who may not, be jurors, it will of course select only its partisans, and those friendly to its measures. It may not only prescribe who may, and who may not, be eligible to be drawn as jurors; but it may also question each person drawn as a juror, as to his sentiments in regard to the particular law involved in each trial, before suffering him to be sworn on the panel; and exclude him if he be found unfavorable to the maintenance of such a law.

* To show that this supposition is not an extravagant one, it may be mentioned that courts have repeatedly questioned jurors to ascertain whether they were prejudiced against the government - that is, whether they were in favor of, or opposed to, such laws of the government as were to be put in issue in the then pending trial. This was done (in 1851) in the United States District Court of - the District of Massachusetts, by Peleg Sprague, the United Slates district judge, in impaneling three several juries for the trials of Scott, Hayden, and Morris, charged with having aided in the rescue of fugitive slave from the custody of the United States deputy Marshall. This judge caused the following question to be propounded to all the jurors separately; and those who answered unfavorably for - the purposes of government, were excluded from the panel.

"Do you hold any opinions upon the subject of the Fugitive Slave

Law, so called, which will induce you to refuse to convict a person indicted under it, if the facts set forth in the indictment, and contesting the offense, are proved against him, and the court direct you that the law is constitutional?"

The reason of this question was, that "the Fugitive Slave Law, so called," was so obnoxious to a large portion of the people, as to render a conviction under it hopeless, if the jurors were taken indiscriminately from among the people.

A similar was soon afterwards propounded to the persons drawn as jurors in the United States District Court for the District of Massachusetts, by Benjamin R. Curtis, one of the Justices of the Supreme Court of the United States, in impaneling a jury for the trial of the aforesaid Morris on the charge before mentioned; and those who did not answer the question favorably for the government were again excluded from the panel.

It has also been an habitual practice with the Supreme Court of Massachusetts, in impaneling juries for the trial of capital offenses, to inquire of the persons drawn as jurors whether they had any conscientious scruples against finding verdicts of guilty in such cases; that is, whether they had any conscientious scruples against sustaining the law prescribing death as the punishment of the crime to be tried; and to exclude from the panel all who answered in the affirmative.

The only principle upon which these questions are asked, is this - that no man shall be allowed to serve as juror, unless he be ready to enforce any enactment of the government, however cruel or tyrannical it may be.

What is such a jury good for, as a protection against the tyranny of the government! A jury like that is palpably nothing but a mere tool of oppression in the hands of the government. A trial by such a jury is really a trial by the government itself - and not a trial by the country - because it is a trial only by men specially selected by the government for their readiness to enforce its own tyrannical measures.

If that be the true principle of the trial by jury, the trial is utterly worthless as a security to liberty. The Czar might, with perfect safety to his authority, introduce the trial by jury into Russia, if he could but be permitted to select his jurors from those whomever ready to maintain his laws, without regard to their injustice.

The example is sufficient to show that the very pith of the trial by jury, as a safeguard to liberty, consists in the jurors being taken indiscriminately from the whole people, and in their right, to hold invalid all laws which they think unjust.

So, also, if the government may dictate to the jury what laws they are to enforce, it is no longer a "trial by the country," but a trial by the government; because the jury then try the accused, not by any standard of their own - not by their own judgments of their rightful liberties - but by a standard dictated to them by the government. And the standard, thus dictated by the government, becomes the measure of the people's liberties. If the government dictate the standard of trial, it of course dictates the results of the trial. And such a trial is no trial by the country, but only a trial by the government; and in it the government determines what are its own powers over the people, instead of the people's determining what are their own liberties against the government. In short, if the jury have no right to judge of the justice of a law of the government, they plainly can do nothing to protect the people against the oppressions of the government; for there are no oppressions which the government may not authorize by law.

The jury are also to judge whether the laws are rightly expounded to them by the court. Unless they judge on this point, they do nothing to protect their liberties against the oppressions that are capable of being practiced under cover of a corrupt exposition of the laws. If the judiciary can authoritatively dictate to a jury any exposition of the law, they can dictate to them the law itself, and such laws as they please; because laws are, in practice, one thing or another, according as they are expounded.

They must also judge whether there really be any such law, (be it

good or bad,) as the accused is charged with having transgressed. Unless they judge on this point, the people are liable to have their liberties taken from them by brute force, without any law at all.

The jury must also judge of the laws of evidence. If the government can dictate to the jury the laws of evidence, it can not only shut out any evidence it pleases, tending to vindicate the accused, but it can require that any evidence whatever, that it pleases to offer, be held as conclusive proof of any offense whatever which the government chooses to allege.

It is manifest, therefore, that the jury must judge of and try the whole case, and every part and parcel of the case, free of any dictation or authority on the part of the government. They must judge of the existence of the law; of the true exposition of the law; of the justice of the law; and of the admissibility of and weight of all the evidence offered; otherwise the government will have everything its own way; the jury will be mere puppets in the hands of the government; and the trial will be, in reality, a trial by the government, and not a "trial by the country." By such trials the government will determine its own powers over the people, instead of the people's determining their own liberties against the government; and it will be an entire delusion to talk, as for centuries we have done, of the trial by the jury, as a "palladium of liberty," or as any protection to the people against the oppression and tyranny of the government.

The question, then, between trial by jury, as thus described, and trial by the government, is simply a question between liberty and despotism. The authority to judge what are the powers of the government, and what are the liberties of the people, must necessarily be vested in one or the other of the parties themselves - the government, or the people; because there is no third party to whom it can be entrusted. If the authority be vested in the government, the government is absolute, and the people have no liberties except such as the government sees fit to indulge them with. If, on the other hand, that authority be vested in the people, then the people have all liberties, (as against the government,) except such as substantially the whole

people (through a jury) choose to disclaim; and the government can exercise no power except such as substantially the whole people (through a jury) consent that it may exercise.

Section II.

The force and justice of the preceding argument cannot be evaded by saying that the government is chosen by the people; that, in theory, it represents the people; that it is designed to do the will of the people; that its members are all sworn to observe the fundamental or constitutional law instituted by the people; that its acts are therefore entitled to be considered the acts of the people; and that to allow a jury, representing the people, to invalidate the acts of government, would therefore be arraying the people against themselves.

There are two answers to such an argument.

One answer is, that, in a representative government, there is no absurdity or contradiction, nor any arraying of the people against themselves, in requiring that the statutes or enactments of the government shall pass the ordeal of any number of separate tribunals, before it shall be determined that they are to have the force of laws.

Our American constitutions have provided five of these separate tribunals, to wit, representatives, senate, executive, jury, and judges; and have made it necessary that each enactment shall pass the ordeal of all these separate tribunals, before its authority can be established by the punishment of those who choose to transgress it. And there is no more absurdity or inconsistency in making a jury one of these several tribunals, than there is in making the representatives, or the senate, or the executive, or the judges, one of them. There is no more absurdity in giving a jury the veto upon the laws, than there is in giving a veto to each of these other tribunals. The people are no more arrayed against themselves, when a jury puts its veto upon a statute, which the other tribunals have sanctioned, than they are when the same veto is exercised by the representatives, the senate, the executive, or the judges.

* The executive has a qualified veto upon the passage of laws, in

most of our governments, and an absolute veto, in all of them, upon the execution of any laws which he deems unconstitutional; because his oath to support the constitution (as he understands it) forbids him to execute any law that he deems unconstitutional.

But another answer to the argument that the people are arrayed against themselves, when a jury hold an enactment of the government invalid, is, that the government, and all the departments of government, are merely the servants and agents of the people; not interested with arbitrary or absolute authority to bind the people, but required to submit all their enactments to the judgment of a tribunal more fairly representing the whole people, before they carry them into execution, by punishing any individual for transgressing them. If the government were not thus required to submit their enactments to the judgment of "the country," before executing them upon individuals - if, in other words, the people had reserved to themselves no veto upon the acts of government, the government, instead of being a mere servant and agent of the people, would be an absolute despot over the people. It would have all power in its own hands; because the power to punish carries all other powers with it. A power that can, of itself, and by its own authority, punish disobedience, can compel obedience and submission, and is above all responsibility for the character of its laws. In short, it is a despotism.

And it is of no consequence to inquire how a government came by this power to punish, whether by prescription, by inheritance, by usurpation, or by delegation of the people? If it have now but got it, the government is absolute.

It is plain, therefore, that if the people have invested the government with power to make laws that absolutely bind the people, and to punish the people for transgressing those laws, the people have surrendered their liberties unreservedly into the hands of the government.

It is of no avail to say, in answer to this view of the case, that in surrendering their liberties into the hands of government, the people took an oath from the government, that it would exercise its power

within certain constitutional limits; for when did oaths ever restrain a government that was otherwise unrestrained? Or when did a government fail to determine that all its acts were within the constitutional and authorized limits of its power, if it were permitted to determine that question for itself?

Neither is it of any avail to say, that, if the government abuse its power, and enact unjust and oppressive laws, the government may be changed by the influence of discussion, and the exercise of the right of suffrage (voting). Discussion can do nothing to prevent the enactment, or procure the repeal, of unjust laws, unless it be understood that the discussion is to be followed by resistance. Tyrants care nothing for discussions that are to end only in discussion. Discussions, which do not interfere with the enforcement of their laws, are but idle wind to them. Suffrage is equally powerless and unreliable. It can be exercised only periodically; and the tyranny must at least be borne until the time for suffrage comes. Besides, when the suffrage is exercised, it gives no guaranty for the repeal of existing laws that are oppressive, and no security against the enactments of new ones that are equally so. The second body of legislators are liable and likely to be just as tyrannical as the first. If it be said that the second body may be chosen for their integrity, the answer is, that the first were chosen for that very reason, and yet proved tyrants. The second will be exposed to the same temptations as the first, and will be just as likely to prove tyrannical. Who ever heard that succeeding legislatures were, on the whole, more honest than those that preceded them? What is there in the nature of men or things to make them so? If it be said that the first body were chosen from motives of injustice, that fact proves that there is a portion of society who desire to establish injustice; and if they were powerful or artful enough to procure the election of their instruments to compose the first legislature, they will be likely to be powerful or artful enough to procure the election of the same or similar instruments to compose the second. The right of suffrage, therefore, and even a change of legislators, guarantees no change of legislation - certainly no change for the better. Even if

a change for the better actually comes, it comes too late, because it comes only after more or less injustice has been irreparably done.

But, at best, the right of suffrage can be exercised only periodically; and between the periods the legislators are wholly irresponsible. No despot was ever more entirely irresponsible than are republican legislators during the period for which they are chosen. They can never be removed from their office, nor called to account while in their office, nor punished after they leave office, be their tyranny what it may. Moreover, the judicial and executive departments of the government are equally irresponsible to the people, and are only responsible, (by impeachment, and dependence for their salaries), to these irresponsible legislators. This dependence of the judiciary and executive upon the legislature is a guaranty that they will always sanction and execute its laws, whether just or unjust. Thus the legislators hold the whole power of the government in their hands, and are at the same time utterly irresponsible for the manner in which they use it.

If, now, this government, (the three branches thus really united in one), can determine the validity of, and enforce, its own laws, it is, for the time being, entirely absolute, and wholly irresponsible to the people.

But this is not all. These legislators, and this government, so irresponsible while in power, can perpetuate their power at pleasure, if they can determine what legislation is authoritative upon the people, and can enforce obedience to it; for they can not only declare their power perpetual, but they can enforce submission to all legislation that is necessary to secure its perpetuity. They can, for example, prohibit all discussion of the rightfulness of their authority; forbid the use of suffrage; prevent the election of any successors; disarm, plunder, imprison, and even kill all who refuse submission. If, therefore, the government (all departments united) be absolute for a day - that is, if it can, for a day, enforce obedience to its own laws - it can, in that day, secure its power for all time - like the queen, who wished to reign but for a day, but in that day caused the king, her husband, to be

slain, and usurped his throne.

Nor will it avail to say that such acts would be unconstitutional, and that unconstitutional acts may be lawfully resisted; for everything a government pleases to do will, of course, be determined to be constitutional, if the government itself be permitted to determine the question of the constitutionality of its own acts. Those who are capable of tyranny, are capable of perjury to sustain it.

The conclusion, therefore, is, that any government, that can, for a day, enforce its own laws, without appealing to the people, (or to a tribunal fairly representing the people,) for their consent, is, in theory, an absolute government, irresponsible to the people, and can perpetuate its power at pleasure.

The trial by jury is based upon a recognition of this principle, and therefore forbids the government to execute any of its laws, by punishing violators, in any case whatever, without first getting the consent of "the country," or the people, through a jury. In this way, the people at all times, hold their liberties in their own hands, and never surrender them, even for a moment, into the hands of government.

The trial by jury, then, gives to any and every individual the liberty, at any time, to disregard or resist any law whatever of the government, if he be willing to submit to the decision of a jury, the questions, whether the law be intrinsically just and obligatory? and whether his conduct, in disregarding or resisting it, were right in itself? And any law, which does not, in such trial, obtain the unanimous sanction of twelve men, taken at random from the people, and judging according to the standard of justice in their own minds, free from all dictation and authority of the government, may be transgressed and resisted with impunity, by whomsoever pleases to transgress or resist it.

* And if there be so much as a reasonable doubt of the justice of the laws, the benefit of that doubt must be given to the defendant, and not to the government. So that the government must keep its laws clearly within the limits of justice, if it would ask a jury to enforce them.

The trial by jury authorizes all this, or it is a sham and a hoax, utterly worthless for protecting the people against oppression. If it do not authorize an individual to resist the first and least act of injustice or tyranny, on the part of the government, it does not authorize him to resist the last and the greatest. If it do not authorize individuals to nip tyranny in the bud, it does not authorize them to cut it down when its branches are filled with the ripe fruits of plunder and oppression.

Those who deny the right of a jury to protect an individual in resisting an unjust law of the government, deny him all legal defence whatsoever against oppression. The right of revolution, which tyrants, in mockery, accord to mankind, is no legal right under a government; it is only a natural right to overturn a government. The government itself never acknowledges this right. And the right is practically established only when and because the government no longer exists to call it in question. The right, therefore, can be exercised with immunity, only when it is exercised victoriously. All unsuccessful attempts at revolution, however justifiable in themselves, are punished as treason, if the government be permitted to judge of the treason. The government itself never admits the injustice of its laws, as a legal defence for those who have attempted a revolution, and failed. The right of revolution, therefore, is a right of no practical value, except for those who are stronger than the government. So long, therefore, as the oppressions of a government are kept within such limits as simply not to exasperate against it a power greater than its own, the right of revolution cannot be appealed to, and is therefore inapplicable to the case. This affords a wide field for tyranny; and if a jury cannot here intervene, the oppressed are utterly defenseless.

It is manifest that the only security against the tyranny of the government lies in forcible resistance to the execution of the injustice; because the injustice will certainly be executed, unless it be forcibly resisted. And if it be but suffered to be executed, it must then be borne; for the government never makes compensation for its own wrongs.

Since, then, this forcible resistance to the injustice of the government is the only possible means of preserving liberty, it is indispensable to all legal liberty that this resistance should be legalized. It is perfectly self-evident that where there is no legal right to resist the oppression of the government, there can be no legal liberty. And here it is all-important to notice, that, practically speaking, there can be no legal right to resist the oppressions of the government, unless there be some legal tribunal, other than the government, and wholly independent of, and above, the government, to judge between the government and those who resist its oppressions; in other words, to judge what laws of the government are to be obeyed, and what may be resisted and held for naught. The only tribunal known to our laws, for this purpose, is a jury. If a jury have not the right to judge between the government and those who disobey its laws, and resist its oppressions, the government is absolute, and the people, legally speaking, are slaves. Like many other slaves they may have sufficient courage and strength to keep their masters somewhat in check; but they are nevertheless known to the law only as slaves.

That this right of resistance was recognized as a common law right, when the ancient and genuine trial by jury was in force, is not only proved by the nature of the trial itself, but is acknowledged by history.

* Hallam says "The relation established between a lord and his vassal by the feudal tenure, far from containing principles of any servile and implicit obedience, permitted the compact to be dissolved in case of its violation by either party. This extended as much to the sovereign as to inferior lords. . . . If a vassal was aggrieved, and if justice was denied him, he sent a defiance, that is, a renunciation of fealty to the king, and was entitled to enforce redress at the point of his sword. It then became a contest of strength as between two independent potentates, and was, terminated by treaty, advantageous or otherwise, according to the fortune of war. . . . There remained the original principle, that allegiance depended conditionally upon good treatment, and that an appeal might be lawfully made to arms against

an oppressive government. Nor was this, we may be sure, left for extreme necessity, or thought to require a long-enduring forbearance. In modern times, a king, compelled by his subjects' sword is to abandon any pretension, would be supposed to have ceased to reign; and the express recognition of such a right is that of insurrection has been justly deemed inconsistent with the majority of law. But ruder ages had ruder sentiments. Force was necessary to repel force; and men accustomed to see the king's authority defied by a private riot, were not much shocked when it was resisted in defence of public freedom." - 3 Middle Ages, 240-3

This right of resistance is recognized by the constitution of the United States, as a strictly legal and constitutional right. It is so recognized, first by the provision that "the trial of all crimes, except in cases of impeachment, shall be by jury" - that is, by the country - and not by the government; secondly, by the provision that "the right of the people to keep and bear arms shall not be infringed." This constitutional security for "the right to keep and bear arms," implies the right to use them - as mush as a constitutional security for the right to buy and keep food would have implied the right to eat it. The constitution, therefore, takes it for granted that the people will judge of the conduct of the government, and that, as they have the right, they will also have the sense, to use arms, whenever the necessity of the case justifies it. And it is a sufficient and legal defence for a person accused of using arms against the government, if he can show, to the satisfaction of a jury, or even any one of a jury, that the law he resisted was an unjust one.

In the American State constitutions also, this right of resistance to the oppressions of the government is recognized, in various ways, as a natural, legal, and constitutional right. In the first place, it is so recognized by provisions establishing the trial by jury; thus requiring that accused persons shall be tried by "the country," instead of the government. In the second place, it is recognized by many of them, as, for example, those of Massachusetts, Maine, Vermont, Connecticut, Pennsylvania, Ohio, Indiana, Michigan, Kentucky, Ten-

nessee, Arkansas, Mississippi, Alabama, and Florida, by provisions expressly declaring that the people shall have the right to bear arms. In many of them also, as, for example, those of Maine, New Hampshire, Vermont, Massachusetts, New Jersey, Pennsylvania, Delaware, Ohio, Indiana, Illinois, Florida, Iowa, and Arkansas, by provisions, in their bills of rights, declaring that men have a natural, inherent, and inalienable right of "defending their lives and liberties." This, of course, means that they have a right to defend them against any injustice on the part of government, and not merely on the part of private individuals; because the object of all bills of rights is to assert the rights of individuals and the people, as against the government, and not as against private persons. It would be a matter of ridiculous supererogation to assert, in a constitution of government, the natural right of men to defend their lives and liberties against private trespassers.

Many of these bills of rights also assert the natural right of all men to protect their property - that is, to protect it against the government. It would be unnecessary and silly indeed to assert, in a constitution of government, the natural right of individuals to protect their property against thieves and robbers.

The constitutions of New Hampshire and Tennessee also declare that "The doctrine of non-resistance against arbitrary power and oppression is absurd, slavish, and destructive of the good and happiness of mankind."

The legal effect of these constitutional recognitions of the right of individuals to defend their property, liberties, and lives, against the government, is to legalize resistance to all injustice and oppression, of every name and nature whatsoever, on the part of the government.

But for this right of resistance, on the part of the people, all governments would become tyrannical to a degree of which few people are aware. Constitutions are utterly worthless to restrain the tyranny of governments, unless it be understood that the people will, by force, compel the government to keep within the constitutional limits. Practically speaking, no government knows any limits to its power, ex-

cept the endurance of the people. But that the people are stronger than the government, and will resist in extreme cases, our governments would be little or nothing else than organized systems of plunder and oppression. All, or nearly all, the advantage there is in fixing any constitutional limits to the power of a government, is simply to give notice to the government of the point at which it will meet with resistance. If the people are then as good as their word, they may keep the government within the bounds they have set for it; otherwise it will disregard them - as is proved by the example of all our American governments, in which the constitutions have all become obsolete, at the moment of their adoption, for nearly or quite all purposes except the appointment of officers, who at once become practically absolute, except so far as they are restrained by the fear of popular resistance.

The bounds set to the power of the government, by the trial by jury, as will hereafter be shown, are these - that the government shall never touch the property, person, or natural or civil rights of an individual, against his consent, (except for the purpose of bringing them before a jury for trial,) unless in pursuance and execution of a judgment, or decree, rendered by a jury in each individual case, upon such evidence, and such law, as are satisfactory to their own understandings and consciences, irrespective of all legislation of the government.

Chapter II.

The Trial By Jury, As Defined by Magna Carta.

That the trial by jury is all that has been claimed for it in the preceding chapter, is proved both by the history and the language of the Great Charter of English Liberties, to which we are to look for a true definition of the trial by jury, and of which the guaranty for that trial is the vital, and most memorable, part.

Section I. The History of Magna Carta

In order to judge of the object and meaning of that chapter of Magna Carta which secures the trial by jury, it is to be borne in mind that, at the time of Magna Carta, the king (with exceptions immaterial to this discussion, but which will appear hereafter) was, constitutionally, the entire government; the sole legislative, judicial, and executive power of the nation. The executive and judicial officers were merely his servants, appointed by him, and removable at his pleasure. In addition to this, "the king himself often sat in his court, which always attended his person. He there heard causes, and pronounced judgment; and though he was assisted by the advice of other members, it is not to be imagined that a decision could be obtained contrary to his inclination or opinion."1 Judges were in those days, and afterwards, such abject servants of the king, that "we find that King Edward I. (1272 to 1307) fined and imprisoned his judges, in the

same manner as Alfred the Great, among the Saxons, had done before him, by the sole exercise of his authority."2

Parliament, so far as there was a parliament, was a mere council of the king.3 It assembled only at the pleasure of the king; sat only during his pleasure; and when sitting had no power, so far as general legislation was concerned, beyond that of simply advising the king. The only legislation to which their assent was constitutionally necessary, was demands for money and military services for extraordinary occasions. Even Magna Carta itself makes no provisions whatever for any parliaments, except when the king should want means to carry on war, or to meet some other extraordinary necessity.4 He had no need of parliaments to raise taxes for the ordinary purposes of government; for his revenues from the rents of the crown lands and other sources, were ample for all except extraordinary occasions. Parliaments, too, when assembled, consisted only of bishops, barons, and other great men of the kingdom, unless the king chose to invite others.5 There was no House of Commons at that time, and the people had no right to be heard, unless as petitioners.6

Even when laws were made at the time of a parliament, they were made in the names of the king alone. Sometimes it was inserted in the laws, that they were made with the consent or advice of the bishops, barons, and others assembled; but often this was omitted. Their consent or advice was evidently a matter of no legal importance to the enactment or validity of the laws, but only inserted, when inserted at all, with a view of obtaining a more willing submission to them on the part of the people. The style of enactment generally was, either "The King wills and commands," or some other form significant of the sole legislative authority of the king. The king could pass laws at any time when it pleased him. The presence of a parliament was wholly unnecessary. Hume says, "It is asserted by Sir Harry Spelman, as an undoubted fact, that, during the reigns of the Norman princes, every order of the king, issued with the consent of his privy council, had the full force of law."7 And other authorities abundantly corroborate this assertion.8

The king was, therefore, constitutionally the government; and the only legal limitation upon his power seems to have been simply the Common Law, usually called "the law of the land," which he was bound by oath to maintain; (which oath had about the same practical value as similar oaths have always had.) This "law of the land" seems not to have been regarded at all by many of the kings, except so far as they found it convenient to do so, or were constrained to observe it by the fear of arousing resistance. But as all people are slow in making resistance, oppression and usurpation often reached a great height; and, in the case of John, they had become so intolerable as to enlist the nation almost universally against him; and he was reduced to the necessity of complying with any terms the barons saw fit to dictate to him.

It was under these circumstances, that the Great Charter of English Liberties was granted. The barons of England, sustained by the common people, having their king in their power, compelled him, as the price of his throne, to pledge himself that he would punish no freeman for a violation of any of his laws, unless with the consent of the peers - that is, the equals - of the accused.

The question here arises, Whether the barons and people intended that those peers (the jury) should be mere puppets in the hands of the king, exercising no opinion of their own as to the intrinsic merits of the accusations they should try, or the justice of the laws they should be called on to enforce? Whether those haughty and victorious barons, when they had their tyrant king at their feet, gave back to him his throne, with full power to enact any tyrannical laws he might please, reserving only to a jury ("the country") the contemptible and servile privilege of ascertaining, (under the dictation of the king, or his judges, as to the laws of evidence), the simple fact whether those laws had been transgressed? Was this the only restraint, which, when they had all power in their hands, they placed upon the tyranny of a king, whose oppressions they had risen in arms to resist? Was it to obtain such a charter as that, that the whole nation had united, as it were, like one man, against their king? Was it on such a charter that

they intended to rely, for all future time, for the security of their liberties? No. They were engaged in no such senseless work as that. On the contrary, when they required him to renounce forever the power to punish any freeman, unless by the consent of his peers, they intended those peers should judge of, and try, the whole case on its merits, independently of all arbitrary legislation, or judicial authority, on the part of the king. In this way they took the liberties of each individual - and thus the liberties of the whole people - entirely out of the hands of the king, and out of the power of his laws, and placed them in the keeping of the people themselves. And this it was that made the trial by jury the palladium of their liberties.

The trial by jury, be it observed, was the only real barrier interposed by them against absolute despotism. Could this trial, then have been such an entire farce as it necessarily must have been, if the jury had had no power to judge of the justice of the laws the people were required to obey? Did it not rather imply that the jury were to judge independently and fearlessly as to everything involved in the charge, and especially as to its intrinsic justice, and thereon give their decision, (unbiased by any legislation of the king,) whether the accused might be punished? The reason of the thing, no less than the historical celebrity of the events, as securing the liberties of the people, and the veneration with which the trial by jury has continued to be regarded, notwithstanding its essence and vitality have been almost entirely extracted from it in practice, would settle the question, if other evidences had left the matter in doubt.

Besides, if the laws were to be authoritative with the jury, why should John indignantly refuse, as at first he did, to grant the charter, (and finally grant it only when brought to the last extremity,) on the ground that it deprived him of all power, and left him only the name of a king? He evidently understood that the juries were to veto his laws, and paralyze his power, at discretion, by forming their own opinions as to the true character of the offences they were to try, and the laws they were to be called on to enforce; and that "the king wills and commands" was to have no weight with them contrary to their

own judgments of what was intrinsically right.9

The barons and people having obtained by the charter all the liberties they had demanded of the king, it was further provided by the charter itself that twenty-five barons, should be appointed by the barons, out of their number, to keep special vigilance in the kingdom to see that the charter was observed, with authority to make war upon the king in case of its violation. The king also, by the charter, so far absolved all the people of the kingdom from their allegiance to him, as to authorize and require them to swear to obey the twenty-five barons, in case they should make war upon the king for infringement of the charter. It was then thought by the barons and people, that something substantial had been done for the security of their liberties.

This charter, in its most essential features, and without any abatement as to the trial by jury, has since been confirmed more than thirty times; and the people of England have always had a traditionary idea that it was of some value as a guaranty against oppression. Yet that idea has been an entire delusion, unless the jury have had the right to judge of the justice of the laws they were called on to enforce.

SECTION II. The Language of Magna Carta.

The language of the Great Charter establishes the same point that is established by its history, viz., that it is the right and duty of the jury to judge of the justice of the laws.

The chapter guaranteeing the trial by jury is in these word:

Nullus liber homo capiatur, vel imprisonetur, aut disseisetur, aut utlagetur, aut exultetur, aut aliquo modo destruatur; nec super eum ibimus, nec super eum mittermus, nisi per legale judicium parium suorum, vel per legem terrae.10

The corresponding chapter in the Great Charter, granted by Henry III., (1225,) and confirmed by Edward I., (1297,) (which charter is now considered the basis of the English laws and constitution,) is in nearly the same words, as follows:

Nullus liber homo capiatur, vel impresonetur, aut disseisetur de

libero tenemento, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum, vel per legem terrae.

The most common translation of these words, at the present day, is as follows:

No freeman shall be arrested, or imprisoned, or deprived of his freehold, or his liberties, or free customs, or outlawed, or exiled, or in any manner destroyed, nor will we (the king) pass upon him, nor condemn him, unless by the judgment of his peers, or the law of the land.

"Nec super eum ibimus, nec super eum mittemus."

There has been much confusion and doubt as to the true meaning of the words, "nec super eum ibimus, nec super eum mittemus." The more common rendering has been, "nor will we pass upon him, nor condemn him." But some have translated them to mean, "nor will we pass upon him, nor commit him to prison." Coke gives still a different rendering, to the effect that "No man shall be condemned at the king's suit, either before the king in his bench, nor before any other commissioner or judge whatsoever."11

But all these translations are clearly erroneous. In the first place, "nor will we pass upon him" - meaning thereby to decide upon his guilt or innocence judicially - is not a correct rendering of the words, "nec super eum ibimus." There is nothing whatever, in these latter words, that indicates judicial action or opinion at all. The words, in their common significance, describe physical action alone. And the true translation of them, as will hereafter be seen, is "nor will we proceed against him," executively.

In the second place, the rendering, "nor will we condemn him," bears little or no analogy to any common, or even uncommon, signification of the words "nec super eum mittemus." There is nothing in these words that indicates judicial action or decision. Their common signification, like that of the words nec super eum ibimus, describes physical action alone. "Nor will we send upon (or against) him,"

would be the most obvious translation, and, as we shall hereafter see, such is the true translation.

But, although these words describe physical action, on the part of the king, as distinguished from judicial, they nevertheless do not mean, as one of the translations has it, "nor will we commit him to prison;" for that would be a mere repetition of what had been already declared by the words "nec imprisonetur." Besides, there is nothing about prisons in the words "nec super cum mittemus;" nothing about sending him anywhere; but only about sending (something or somebody) upon him, or against him - that is, executively.

Coke's rendering is, if possible, the most absurd and gratuitous of all. What is there in the words, "nec super eum mittemus," that can be made to mean "nor shall he be condemned before any other commissioner or judge whatsoever?" Clearly there is nothing. The whole rendering is a sheer fabrication. And the whole object of it is to give color for the exercise of a judicial power, by the king, or his judges, which is nowhere given them.

Neither the words, "nec super eum ibimus, nec super eum mittemus," nor any other words in the whole chapter, authorize, provide for, describe, or suggest, any judicial action whatever, on the part either of the king, or of his judges, or of anybody, except the peers, or jury. There is nothing about the king's judges at all. And there is nothing whatever, in the whole chapter, so far as relates to the action of the king, that describes or suggests anything but executive action.12

But that all these translations are certainly erroneous, is proved by a temporary charter, granted by John a short time previous to the Great Charter, for the purpose of giving an opportunity for conference, arbitration, and reconciliation between him and his barons. It was to have force until the matters in controversy between them could be submitted to the Pope, and to other persons to be chosen, some by the king, and some by the barons. The words of the charter are as follows:

Sciatis nos concessisse baronibus nostris qui contra nos sunt quod

nec eos nec homines suos capiemus, nec disseisiemus nec super eos per vim vel per arma ibimus nisi per legem regni nostri vel per judicium parium suorum in curia nostra donec consideratio facta fuerit," etc., etc.

That is,

Know that we have granted to our barons who are opposed to us, that we will neither arrest them nor their men, nor disseize them, nor will we proceed against them by force or by arms, unless by the law of our kingdom, or by the judgment of their peers in our court, until consideration shall be had, etc., etc.

A copy of this charter is given in a note in Blackstone's Introduction to the Charters. 13

Mr. Christian speaks of this charter as settling the true meaning of the corresponding clause of Magna Carta, on the principle that laws and charters on the same subject are to be construed with reference to each other. See 3 Christian's Blackstone, 41, note.

The true meaning of the words, nec super eum ibimus, nec super eum mittemus, is also proved by the "Articles of the Great Charter of Liberties," demanded of the king by the barons, and agreed to by the king, under seal, a few days before the date of the Charter, and from which the Charter was framed.14 Here the words used are these:

Ne corpus liberi hominis capiatur nec imprisonetur nec disseisetur nec utlagetur nec exuletur nec aliquo modo destruatur nec rex eat vel mittat super eum vi nisi per judicium parium suorum vel per legem terrae.

That is,

The body of a freeman shall not be arrested, nor imprisoned, nor disseized, nor outlawed, nor exiled, nor in any manner destroyed, nor shall the king proceed or send (any one) against him WITH FORCE, unless by the judgment of his peers, or the law of the land.

The true translation of the words nec super eum ibimus, nec super eum mittemus, in Magna Carta, is thus made certain, as follows, "nor will we (the king) proceed against him, nor send (any one) against him WITH FORCE OF ARMS. "15

It is evident that the difference between the true and false translations of the words, nec super eum ibimus, nec super eum mittemus, is of the highest legal importance, inasmuch as the true translation, nor will we (the king) proceed against him, not send (any one) against him by force or arms, represents the king only in an executive character, carrying the judgment of the peers and "the law of the land" into execution; whereas the false translation, nor will we pass upon him, nor condemn him, gives color for the exercise of a judicial power, on the part of the king, to which the king had no right, but which, according to the true translation, belong wholly to the jury.

"Per legale judicium parium suorum."

The foregoing interpretation is corroborated, (if it were not already too plain to be susceptible of corroboration,) by the true interpretation of the phrase "per legale judicium parium suorum."

In giving this interpretation, I leave out, for the present, the word legale, which will be defined afterwards.

The true meaning of the phrase, per judicium parium suorum, is, according to the sentence of his peers. The word judicium, judgment, has a technical meaning in the law, signifying the decree rendered in the decision of a cause. In civil suits this decision is called a judgment; in chancery proceedings it is called a decree; in criminal actions it is called a sentence, or judgment, indifferently. Thus, in a criminal suit, "a motion in arrest of judgment," means a motion in arrest of sentence.16

In cases of sentence, therefore, in criminal suits, the words sentence, and judgment are synonymous terms. They are, to this day, commonly used in law books as synonymous terms. And the phrase per judicium parium suorum, therefore, implies that the jury are to fix the sentence.

The word per means according to. Otherwise there is no sense in the phrase per judicium parium suorum. There would be no sense in saying that a king might imprison, disseize, outlaw, exile, or otherwise punish a man, or proceed against him, or send any one against him, by force or arms, by a judgment of his peers; but there is sense

in saying that the king may imprison, disseize, and punish a man, or proceed against him, or send any one against him, by force or arms, according to a judgment, or sentence, of his peers; because in that case the king would be merely carrying the sentence or judgment of the peers into execution.

The word per, in the phrase "per judicium parium suorum," of course means precisely what it does in the next phrase, "per legem terrae;" where it obviously means according to, and not by, as it is usually translated. There would be no sense in saying that the king might proceed against a man by force or arms, by the law of the land; but there is sense in saying that he may proceed against him, by force or arms, according to the law of the land; because the king would then be acting only as an executive officer, carrying the law of the land into execution. Indeed, the true meaning of the word by, as used in similar cases now, always is according to; as, for example, when we say a thing was done by the government, or by the executive, by law, we mean only that it was done by them according to law; that is, that they merely executed the law.

Or, if we say that the word by signifies by authority of, the result will still be the same; for nothing can be done by authority of law, except what the law itself authorizes or directs to be done; that is, nothing can be done by authority of law, except simply to carry the law itself into execution. So nothing could be done by authority of the sentence of the peers, or by authority of "the law of the land," except what the sentence of the peers, or the law of the land, themselves authorized or directed to be done; nothing, in short, but to carry the sentence of the peers, or the law of the land, themselves into execution.

Doing a thing by law, or according to law, is only carrying the law into execution. And punishing a man by, or according to, the sentence or judgment of his peers, is only carrying that sentence or judgment into execution.

If these reasons could leave any doubt that the word per is to be translated according to, that doubt would be removed by the he terms

of an antecedent guaranty for the trial by jury, granted by the Emperor Conrad, of Germany,17 two hundred years before Magna CARTA. Blackstone cites it as follows: - (3 Blackstone, 350.)

"Nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum, et judicium parium suorum." That is, No one shall lose his estate,18 unless according to ("secundum") the custom (or law) of our ancestors, and (according to) the sentence (or judgment) of his peers.

The evidence is therefore conclusive that the phrase per judicium parium suorum means according to the sentence of his peers; thus implying that the jury, and not the government, are to fix the sentence.

If any additional proof were wanted that juries were to fix the sentence, it would be found in the following provisions of Magna Carta, viz.:

A freeman shall not be amerced for a small crime, (delicto,) but according to the degree of the crime; and for a great crime in proportion to the magnitude of it, saving to him his contenement;19 and after the same manner a merchant, saving to him his merchandise. And a villein shall be amerced after the same manner, saving to him his waynage,20 if he fall under our mercy; and none of the aforesaid amercements shall be imposed, (or assessed, ponatur,) but by the oath of honest men of the neighborhood. Earls and Barons shall not be amerced but by their peers, and according to the degree of their crime."21

Pecuniary punishments were the most common punishments at that day, and the foregoing provisions of Magna Carta show that the amount of those punishments was to be fixed by the jury.

Fines went to the king, and were a source of revenue; and if the amounts of the fines had been left to be fixed by the king, he would have had a pecuniary temptation to impose unreasonable and oppressive ones. So, also, in regard to other punishments than fines. If it were left to the king to fix the punishment, he might often have motives to inflict cruel and oppressive ones. As it was the object of

the trial by jury to protect the people against all possible oppression from the king, it was necessary that the jury, and not the king, should fix the punishments.22

"Legale."

The word "legale," in the phrase "per legale judicium parium suorum," doubtless means two things.

1. That the sentence must be given in a legal manner; that is, by the legal number of jurors, legally empaneled and sworn to try the cause; and that they give their judgment or sentence after a legal trial, both in form and substance, has been had.

2. That the sentence shall be for a legal cause or offence.

If, therefore, a jury should convict and sentence a man, either without giving him a legal trial, or for an act that was not really and legally criminal, the sentence itself would not be legal; and consequently this clause forbids the king to carry such a sentence into execution; for the clause guarantees that he will execute no judgment or sentence, except it be legale judicium, a legal sentence. Whether a sentence be a legal one, would have to be ascertained by the king or his judges, on appeal, or might be judged of informally by the king himself.

The word "legale" clearly did not mean that the judicium parium suorum (judgment of his peers) should be a sentence which any law (of the king) should require the peers to pronounce; for in that case the sentence would not be the sentence of the peers, but only the sentence of the law, (that is, of the king); and the peers would be only a mouthpiece of the law, (that is, of the king,) in uttering it.

"Per legem terrae."

One other phrase remaining to be explained, viz., "per legem terrae," "by the law of the land."

All writers agree that this means the common law. Thus, Sir Matthew Hale says:

The common law is sometimes called, by way of eminence, lex terrae, as in the stature of Magna Carta, chap. 29, where certainly the common law is principally intended by those words, aut per legem

terrae; as appears by the exposition thereof in several subsequent statutes; and particularly in the statute of 28 Edward III. chap. 3, which is but an exposition and explanation of that statute. Sometimes it is called lex Angliae, as in the statute of Merton, cap. 9, "Nolumus leges Angliae mutari," etc., (We will that the laws of England be not changed). Sometimes it is called lex et consuetudo regni (the law and custom of the kingdom); as in all commissions of oyer and terminer; and in the statutes of 18 Edward I., cap., and de quo warranto, and divers others. But most commonly it is called the Common Law, or the Common Law of England; as in the statute Articuli super Chartas, cap. 15, in the statute 25 Edward III., cap. 5, (4,) and infinite more records and statutes. - 1 Hale's History of the Common Law, 128.

This common law, or "law of the land," the king was sworn to maintain. This fact is recognized by a statute made at Westminster, in 1346, by Edward III., which commences in this manner:

Edward, by the Grace of God, etc., etc., to the Sheriff of Stafford, Greeting: Because that by divers complaints made to us, we have perceived that the law of the land, which we by oath are bound to maintain, etc. - St. 20 Edward III.

The foregoing authorities are cited to show to the unprofessional reader, what is well known to the profession, that legem terrae, the law of the land, mentioned in Magna Carta, was the common, ancient, fundamental law of the land, which the kings were bound by oath to observe; and that it did not include any statutes or laws enacted by the king himself, the legislative power of the nation.

If the term legem terrae had included laws enacted by the king himself, the whole chapter of Magna Carta, now under discussion, would have amounted to nothing as a protection to liberty; because it would have imposed no restraint whatever upon the power of the king. The king could make laws at any time, and such ones as he pleased. He could, therefore, have done anything he pleased, by the law of the land, as well as in any other way, if his own laws had been "the law of the land." If his own laws had been "the law of the land,"

within the meaning of that term as used in Magna Carta, this chapter of Magna Carta would have been sheer nonsense, inasmuch as the whole purport of it would have been simply that "no man shall be arrested, imprisoned, or deprived of his freehold, or his liberties, or free customs, or outlawed, or exiled, or in any manner destroyed (by the king); nor shall the king proceed against him, nor send any one against him with force and arms, unless by the judgment of his peers, or unless the king shall please to do so."

This chapter of Magna Carta would, therefore, have imposed not the slightest restraint upon the power of the king, or afforded the slightest protection to the liberties of the people, if the laws of the king had been embraced in the term legam terrae. But if legem terrae was the common law, which the king was sworn to maintain, then a real restriction was laid upon his power, and a real guaranty given to the people for their liberties.

Such, then, being the meaning of legem terrae, the fact is established that Magna Carta took an accused person entirely out of the hands of the legislative power, that is, of the king; and placed him in the power and under the protection of his peers, and the common law alone; that, in short, Magna Carta suffered no man to be punished for violating any enactment of the legislative power, unless the peers or equals of the accused freely consented to it, or the common law authorized it; that the legislative power, of itself, was wholly incompetent to require the conviction or punishment of a man for any offence whatever.

Whether Magna Carta allowed of any other trial than by Jury.

The question here arises, whether "legem terrae" did not allow of some other mode of trial than that by jury.

The answer is, that, at the time of Magna Carta, it is not probable, (for the reasons given in the note,) that legem terrae authorized, in criminal cases, any other trial than the trial by jury; but, if it did, it certainly authorized none but the trial by battle, the trial by ordeal, and the trial by compurgators. These were the only modes of trial, except by jury, that had been known in England, in criminal cases,

for some centuries previous to Magna Carta. All of them had become nearly extinct at the time of Magna Carta, and it is not probable that they were included in "legem terrae," as that term is used in that instrument. But if they were included in it, they have now been long obsolete, and were such as neither this nor any future age will ever return to.23 For all practical purposes of the present day, therefore, it may be asserted that Magna Carta allows no trial whatever but trial by jury.

Whether Magna Carta allowed sentence to be fixed otherwise than by jury.

Still another question arises on the words legem terrae, viz., whether, in cases where the question of guilt was determined by the jury, the amount of punishment may not have been fixed by legem terrae, the common law, instead of its being fixed by the jury.

I think we have no evidence whatever that, at the time of Magna Carta, or indeed at any other time, lex terrae, the common law, fixed the punishment in cases where the question of guilt was tried by a jury; or, indeed, that it did in any other case. Doubtless certain punishments were common and usual for certain offences; but I do not think it can be shown that the common law, the lex terrae, which the king was sworn to maintain, required any one specific punishment, or any precise amount of punishment, for any one specific offence. If such a thing be claimed, it must be shown, for it cannot be presumed. In fact the contrary must be presumed, because, in the nature of things, the amount of punishment proper to be inflicted in any particular case, is a matter requiring the exercise of discretion at the time, in order to adapt it to the moral quality of the offence, which is different in each case, varying with the mental and moral constitutions of the offenders, and the circumstances of temptation or provocation. And Magna Carta recognizes this principle distinctly, as has before been shown, in providing that freemen, merchants, and villeins, "shall not be amerced for a small crime, but according to the degree of the crime; and for a great crime in proportion to the magnitude of it;" and that "none of the aforesaid amercements shall be imposed (or

assessed) but by the oaths of honest men of the neighborhood;" and that "earls and barons shall not be amerced but by their peers, and according to the quality of the offence."

All this implies that the moral quality of the offence was to be judged of at the trial, and that the punishment was to be fixed by the discretion of the peers, or jury, and not by any such unvarying rule as a common law rule would be.

I think, therefore, it must be conceded that, in all cases, tried by a jury, Magna Carta intended that the punishment should be fixed by the jury, and not by the common law, for these several reasons.

1. It is uncertain whether the common law fixed the punishment of any offence whatever.

2. The words "per judicium parium suorum," according to the sentence of his peers, imply that the jury fixed the sentence in some cases tried by them; and if they fixed the sentence in some cases, it must be presumed they did in all, unless the contrary be clearly shown.

3. The express provisions of Magna Carta, before adverted to, that no amercements, or fines, should be imposed upon freemen, merchants, or villeins, "but by oath of honest men of the neighborhood," and "according to the degree of the crime," and that "earls and barons should not be amerced but by their peers, and according to the quality of the offence," proves that, at least, there was no common law fixing the amount of fines, or, if there were, that it was to be no longer in force. And if there was no common law fixing the amount of fines, or if it was no longer in force, it is reasonable to infer, (in the absence of all evidence to the contrary,) either that the common law did not fix the amount of any other punishment, or that it was to be no longer in force for that purpose.24

Under the Saxon laws, fines, payable to the injured party, seem to have been the common punishments for all offences. Even murder was punishable by a fine payable to the relatives of the deceased. The murder of the king even was punishable by fine. When a criminal was unable to pay his fine, his relatives often paid it for him. But if it were not paid, he was put out of the protection of the law, and the

injured parties, (or, in the case of murder, the kindred of the deceased,) were allowed to inflict such punishment as they pleased. And if the relatives of the criminal protected him, it was lawful to take vengeance on them also. Afterwards the custom grew up or exacting fines also to the king as a punishment for offences.25 And this latter was, doubtless, the usual punishment at the time of Magna Carta, as is evidenced by the fact that for many years immediately following Magna Carta, nearly or quite all statutes that prescribed any punishment at all, prescribed that the offender should "be grievously amerced, or "pay a great fine to the king," or a grievous ransom," - with the alternative in some cases (perhaps understood in all) of imprisonment, banishment, or outlawry, in case of non-payment.26

Judging, therefore, from the special provisions in Magna Carta, requiring fines, or amercements, to be imposed only by juries, (without mentioning any other punishments;) judging, also, from the statutes which immediately followed Magna Carta, it is probable that the Saxon custom of punishing all, or nearly all, offences by fines, (with the alternative to the criminal of being imprisoned, banished, or outlawed, and exposed to private vengeance, in case of non-payment,) continued until the time of Magna Carta; and that in providing expressly that fines should be fixed by the juries, Magna Carta provided for nearly or quite all the punishments that were expected to be inflicted; that if there were to be any others, they were to be fixed by the juries; and consequently that nothing was left to be fixed by "legem terrae."

But whether the common law fixed the punishment of any offences, or not, is a matter of little or no practical importance at this day; because we have no idea of going back to any common law punishments of six hundred years ago, if, indeed, there were any such at that time. It is enough for us to know - and this is what it is material for us to know - that the jury fixed the punishments, in all cases, unless they were fixed by the common law; that Magna Carta allowed no punishments to be prescribed by statute - that is, by the legislative power - nor in any other manner by the king, or his judges,

in any case whatever; and, consequently, that all statutes prescribing particular punishments for particular offences, or giving the king's judges any authority to fix punishments, were void.

If the power to fix punishments had been left in the hands of the king, it would have given him a power of oppression, which was liable to be greatly abused; which there was no occasion to leave with him; and which would have been incongruous with the whole object of this chapter of Magna Carta; which object was to take all discretionary or arbitrary power over individuals entirely out of the hands of the kin, and his laws, and entrust it only to the common law, and the peers, or jury - that is, the people.

What lex terrae did authorize.

But here the question arises, what then did "legem terrae" authorize the king, (that is, the government,) to do in the case of an accused person, if it neither authorized any other trial than that by jury, nor any other punishment than those fixed by juries?

The answer is, that, owing to the darkness of history on the point, it is probably wholly impossible, at this day, to state, with any certainty or precision, anything whatever that the legem terrae of Magna Carta did authorize the king, (that is, the government,) to do, (if, indeed, it authorized him to do anything,) in the case of criminals, other than to have them tried and sentenced by their peers, for common law crimes; and to carry that sentence into execution.

The trial by jury was a part of legem terrae, and we have the means of knowing what the trial by jury was. The fact that the jury were to fix the sentence, implies that they were to try the accused; otherwise they could not know what sentence, or whether any sentence, ought to be inflicted upon him. Hence it follows that the jury were to judge of everything involved in the trial; that is, they were to judge of the nature of the offence, of the admissibility and weight of testimony, and of everything else whatsoever that was of the essence of the trial. If anything whatever could be dictated to them, either of law or evidence, the sentence would not be theirs, but would be dictated to them by the power that dictated to them the law or evidence. The

trial and sentence, then, were wholly in the hands of the jury.

We also have sufficient evidence of the nature of the oath administered to jurors in criminal cases. It was simply, that they would neither convict the innocent, nor acquit the guilty. This was the oath in the Saxon times, and probably continued to be until Magna Carta.

We also know that, in case of conviction, the sentence of the jury was not necessarily final; that the accused had the right of appeal to the king and his judges, and to demand either a new trial, or an acquittal, if the trial or conviction had been against law.

So much, therefore, of the legem terrae of Magna Carta, we know with reasonable certainty.

We also know that Magna Carta provides that "No bailiff (balivus) shall hereafter put any man to his law, (put him on trial,) on his single testimony, without credible witnesses brought to support it." Coke thinks "that under this word balivus, in this act, is comprehended every justice, minister of the king, steward of the king, steward and bailiff." (2 Inst. 44.) And in support of this idea he quotes from a very ancient law book, called the Mirror of Justices, written in the time of Edward I., within a century after Magna Carta. But whether this were really a common law principle, or whether the provision grew out of that jealousy of the government which, at the time of Magna Carta, had reached its height, cannot perhaps now be determined.

We also know that, by Magna Carta, amercements, or fines, could not be imposed to the ruin of the criminal; that, in the case of a freeman, his contenement, or means of subsisting in the condition of a freeman, must be saved to him; that, in the case of a merchant, his merchandise must be spared; and in the case of a villein, his waynage, or plough-tackle and carts. This also is likely to have been a principle of the common law, inasmuch as, in that rude age, when the means of getting employment as laborers were not what they are now, the man and his family would probably have been liable to starvation, if these means of subsistence had been taken from him.

We also know, generally, that, at the time of Magna Carta, all acts

intrinsically criminal, all trespasses against persons and property, were crimes, according to lex terrae, or the common law.

Beyond the point now given, we hardly know anything, probably nothing with certainty, as to what the "legem terrae" of Magna Carta did authorize, in regard to crimes. There is hardly anything extant that can give us any real light on the subject.

It would seem, however, that there were, even at that day, some common law principles governing arrests; and some common law forms and rules as to holding a man for trial, (by bail or imprisonment;) putting him on trial, such as by indictment or complaint; summoning and empanelling jurors, etc., etc., Whatever these common law principles were, Magna Carta requires them to be observed; for Magna Carta provides for the whole proceedings, commencing with the arrest, ("no freeman shall be arrested," etc.,) and ending with the execution of the sentence. And it provides that nothing shall be done, by the government, from beginning to end, unless according to the sentence of the peers, or "legem terrae," the common law. The trial by peers was a part of legem terrae, and we have seen that the peers must necessarily have governed the whole proceedings at the trial. But all the proceedings for arresting the man, and bringing hem to trial, must have been had before the case could come under the cognizance of the peers, and they must, therefore, have been governed by other rules than the discretion of the peers. We may conjecture, although we cannot perhaps know with much certainty, that the lex terrae, or common law, governing these other proceedings, was somewhat similar to the common law principles, on the same points, at the present day. Such seem to be the opinions of Coke, who says that the phrase nisi per legem terrae means unless by due process of law.

Thus, he says:

Nisi per legem terrae. But by the law of the land. For the true sense and exposition of these words, see the statute of 37 Edw. III., cap. 8, where the words, by the law of the land, are rendered without due process of law; for there it is said, though it be contained in the Great Charter, that no man be taken, imprisoned, or put our of his

freehold, without process of the law; that is, by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law.

Without being brought in to answer but by due process of the common law.

No man be put to answer without presentment before justices, or thing of record, or by due process, or by writ original, according to the old law of the land. - 2 Inst. 50.

The foregoing interpretations of the words nisi per legem terrae are corroborated by the following statutes, enacted in the next century after Magna Carta.

That no man, from henceforth, shall be attached by any accusation, nor forejudged of life or limb, nor his land, tenements, goods, nor chattels, seized into the king's hands, against the forms of the Great Charter, and the law of the land." - St. 5 Edward III., Ch. 9. (1331.)

Whereas it is contained in the Great Charter of the franchises of England, that none shall be imprisoned, nor put out of his freehold, nor of his franchises, nor free customs, unless it be by the law of the land; it is accorded, assented, and established, that from henceforth none shall be taken by petition, or suggestion made to our lord the king, or to his council, unless it be by indictment or presentment of good and lawful people of the same neighborhood where such deeds be done in due manner, or by process made by writ original at the common law; nor that none be put our of his franchises, nor of his freehold, unless he be duly brought into answer, and forejudged of the same by the course of the law; and if anything be done against the same, it shall be redressed and holden for none. - St. 25 Edward III., Ch. 4. (1350.)

That no man, of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought in answer by due process of law. - St. 28 Edward., Ch. 3. (1354.)

That no man be put to answer without presentment before jus-

tices, or matter of record, or by due process and writ original, according to the old law of the land. And if anything from henceforth be done to the contrary, it shall be void in law, and holden for error. - St. 42 Edward III., Ch. 3. (1368.)

The foregoing interpretation of the words nisi per legem terrae - that is, by due process of law - including indictment, etc., has been adopted as the true one by modern writers and courts; as, for example, by Kent, (2 Comm. 13,) Story, (3 Comm. 661,) and the Supreme Court of New York, (19 Wendell, 676; 4 Hill, 146.)

The fifth amendment to the constitution of the United States seems to have been formed on the same idea, inasmuch as it provides that "no person shall be deprived of life, liberty, or property, without due process of law."27

Whether the word VEL should be rendered by OR, or by AND.

Having thus given the meanings, or rather the applications, which the words vel per legem terrae will reasonably, and perhaps must necessarily, bear, it is proper to suggest, that it has been supposed by some that the word vel, instead of being rendered by or, as it usually is, ought to be rendered by and, inasmuch as the word vel is often used for et, and the whole phrase nisi per judicium parium suorum, vel per legem terrae, (which would then read, unless by the sentence of his peers, and the law of the land,) would convey a more intelligible and harmonious meaning than it otherwise does.

Blackstone suggests that this may be the true reading. (Charters, p. 41.) Also Mr. Hallam, who says:

Nisi per legale judicium parium suorum, vel per legem terrae. Several explanations have been offered of the alternative clause; which some have referred to judgment by default, or demurrer; others to the process of attachment for contempt. Certainly there are many legal procedures besides trial by jury, through which a party's goods or person may be taken. But one may doubt whether these were in contemplation of the framers of Magna Carta. In an entry of the Charter of 1217 by a contemporary hand, preserved in the Town-clerk's office in London, called Liber Custumarum et Regum antiquarum, a

various reading, et per legem terrae, occurs. Blackstone's Charters, p. 42 (41.) And the word vel is so frequently used for et, that I am not wholly free from a suspicion that it was so intended in this place. The meaning will be, that no person shall be disseized, etc., except upon a lawful cause of action, found by the verdict of a jury. This really seems as good as any of the disjunctive interpretations; but I do not offer it with much confidence." - 2 Hallam's Middle Ages, Ch. 8, Part 2, p. 449, note.28

The idea that the word vel should be rendered by and, is corroborated, if not absolutely confirmed, by the following passage in Blackstone, which has before been cited. Speaking of the trial by jury, as established by Magna Carta, he calls it,

A privilege which is couched in almost the same words with that of the Emperor Conrad two hundred years before: "nemo beneficium suum perdat, nisi secundum consuetudinem antecessorum nostrorum, et judicium parium suorum." (No one shall lose his estate unless according to the custom of our ancestors, and the judgment of his peers.) - 3 Blackstone, 350.

If the word vel be rendered by and, (as I think it must be, at least in some cases,) this chapter of Magna Carta will then read that no freeman shall be arrested or punished, "unless according to the sentence of his peers, and the law of the land."

The difference between this reading and the other is important. In the one case, there would be, at first view, some color of ground for saying that a man might be punished in either of two ways, viz., according to the sentence of his peers, or according to the law of the land. In the other case, it requires both the sentence of his peers and the law of the land (common law) to authorize his punishment.

If this latter reading be adopted, the provision would seem to exclude all trials except trial by jury, and all causes of action except those of the common law.

But I apprehend the word vel must be rendered both by and, and by or; that in cases of a judgment, it should be rendered by and, so as to require the concurrence both of "the judgment of the peers and the

law of the land," to authorize the king to make execution upon a party's goods or person; but that in cases of arrest and imprisonment, simply for the purpose of bringing a man to trial, vel should be rendered by or, because there can have been no judgment of a jury in such a case, and "the law of the land" must therefore necessarily be the only guide to, and restraint upon, the king. If this guide and restraint were taken away, the king would be invested with an arbitrary and most dangerous power in making arrests, and confining in prison, under pretense of an intention to bring to trial.

Having thus examined the language of this chapter of Magna Carta, so far as it relates to criminal cases, its legal import may be stated as follows, viz.:

No freeman shall be arrested, or imprisoned, or deprived of his freehold, or his liberties, or free customs, or by outlawed, or exiled, or in any manner destroyed, (harmed,) nor will we (the king) proceed against him, nor send any one against him, by force or arms, unless according to (that is, in execution of) the sentence of his peers, and (or or, as the case may require) the Common Law of England, (as it was at the time of Magna Carta, in 1215.)

NOTES

1. 1 Hume, Appendix 2.

2. Crabbe's History of the English law, 236.

3. Coke says, "The king of England is armed with divers councils, one whereof is called commune concilium, (the common council,) and that is the court of parliament, and so it is legally called in writs and judicial proceedings commune concilium regni Angliae, (the common council of the kingdom of England.) And another is called magnum concilium, (great council;) this is sometimes applied to the upper house of parliament, and sometimes, out of parliament time, to the peers of the realm, lords of parliament, who are called magnum concilium regis, (the great council of the king;)... Thirdly, (as every man knoweth,) the king hath a privy council for matters of state.... The fourth council of the king are the judges for law mat-

ters." - 1 Coke's Institutes, 110 a.

4. The Great Charter of Henry III., (1216 and 1225,) confirmed by Edward I., (1297,) makes no provision whatever for, or mention of, a parliament, unless the provision, (Ch. 37,) that "Escuage, (a military contribution,) from henceforth shall be taken like as it was wont to be in the time of King Henry our grandfather," mean that a parliament shall be summoned for that purpose.

5. The Magna Carta of John, (Ch. 17 and 18,) defines those who were entitled to be summoned to parliament, to wit, "The Archbishops, Bishops, Abbots, Earls, and Great Barons of the Realm,... and all others who hold of us in chief." Those who held land of the king in chief included none below the rank of knights.

6. The parliaments of that time were, doubtless, such as Carlyle describes them, when he says, "The parliament was at first a most simple assemblage, quite cognate to the situation; that Red William, or whoever had taken on him the terrible task of being King of England, was wont to invite, oftenest about Christmas time, his subordinate Kinglets, Barons as he called them, to give him the pleasure of their company for a week or two; there, in earnest conference all morning, in freer talk over Christmas cheer all evening, in some big royal hall of Westminster, Winchester, or wherever it might be, with log fires, huge rounds of roast and boiled, not lacking malmsey and other generous liquor, they took counsel concerning the arduous matters of the kingdom."

7. Hume, Appendix 2.

8. This point will be more fully established hereafter.

9. It is plain that the king and all his partisans looked upon the charter as utterly prostrating the king's legislative supremacy before the discretion of juries. When the schedule of liberties demanded by the barons was shown to him, (of which the trial by jury was the most important, because it was the only one that protected all the rest,) "the king, falling into a violent passion, asked, Why the barons did not with these exactions demand his kingdom?... and with a solemn oath protested, that he would never grant such liberties as would

make himself a slave.". . . But afterwards, "seeing himself deserted, and fearing they would seize his castles, he sent the Earl of pembroke and other faithful messengers to them, to let them know he would grant them the laws and liberties they desired.". . . But after the charter had been granted, "the king's vercenary soldiers, desiring war more than peace, were by their leaders continually whispering in his ears, that he was now no longer king, but the scorn of other princes; and that it was more eligible to be no king, than such a one as he.". . . He applied "to the Pope, that he might by his apostolic authority make void what the barons had done. . . . At Rome he met with what success he could desire, where all the transactions with the barons were fully represented to the Pope, and the Charter of Liberties shown to him, in writing; which, when he had carefully perused, he, with a furious look, cried out, What! Do the barons of England endeavor to dethrone a king, who has taken upon him the Holy Cross, and is under the protection of the Apostolic See; and would they force him to transfer the dominions of the Roman Church to others? By St. Peter, this injury must not pass unpunished. Then debating the matter with the cardinals, he, by a definitive sentence, damned and cassated forever the Charter of liberties, and sent the king a bull containing that sentence at large." - Echard's History of England, p. 106 - 7.

These things show that the nature and effect of the charter were well understood by the king and his friends; that they all agreed that he was effectually stripped of power. Yet the legislative power had not been taken from him; but only the power to enforce the laws, unless juries should freely consent to their enforcement.

10. The laws were, at the time, all written in Latin.

11. "No man shall be condemned at the king's suit, either before the king in his bench, where pleas are coram rege, (before the king,) (and so are the words nec super eum ibimus, to be understood,) nor before any other commissioner or judge whatsoever, and so are the words nec super eum mittemus, to be understood, but by the judgment of his peers, that is, equals, or according to the law of the land."

- 2 Coke's Inst., 46.

12. Perhaps the assertion in the text should be made with this qualification - that the words "per legem terrae," (according to the law of the land,) and the words "per legale judicium parium suorum," (according to the legal judgment of his peers,) imply that the king, before preceeding to any executive action, will take notice of "the law of the land," and of the legality of the judgment of the peers, and will execute upon the prisoner noting except what the law of the land authorizes, and no judgments of the peers, except legal ones. With this qualification, the assertion in the text is strictly correct - that there is nothing in the whole chapter that grants to the king, or his judges, any judicial power at all. The chapter only describes and limits his executive power.

13. See Blackstone's Law Tracts, page 294, Oxford Edition.

14. These Articles of the Charter are given in Blackstone's collection of Charters, and are also printed with the Statutes of the Realm. Also in Wilkins' Laws of the Anglo-Saxons, p. 356.

15. Lingard says, "the words, 'We will not destroy him, nor will we go upon him, nor will we send upon him,' have been very differently expounded by different legal authorities. Their real meaning may be learned from John himself, who the next year promised by his letters, patent. . . nec super eos per vim vel per arma ibimus, nisi per legem regni nostri, vel per judicium parium suorum in curia nostra, (nor will we go upon them by force of arms, unless by the law of our kingdom, or in the judgment of their peers in our court.) Pat. 16 Johan, apud Drad. 11, app. no. 124. He had hitherto been in the habit of going with an armed force, or sending an armed force on the lands, and against the castles, of all whom he knew or suspected to be his secret enemies, without observing any form of law." - Lingard, 47.note.

16. "Judgment, judicium. . . . The sentence of the law, pronounced by the court, upon the matter contained in the record." - 3 Blackstone, 395. Jacob's Law Dictionary. Tomlin's do.

"Judgment is the decision or sentence of the law, given by a court

of justice or other competent tribunal, as the result of the proceedings instituted therein, for the redress of an injury." -Bouvier's Law Dict.

"Judgment, judicium. . . . Sentence of the judge against a criminal. . . . Determination, decision in general." - Bailey's Dict.

"Judgment. . . . In a legal sense, a sentence or decision pronounced by authority of a king, or other power, either by their own mouth, or by that of their judges and officers, whom they appoint to administer justice in their stead." - Chambers' Dict.

"Judgment. . . . In law, the sentence or doom pronounced in any case, civil or criminal, by the judge or court by which it is tried." - Webster's Dict.

Sometimes the punishment itself is called judicium, judgment; or, rather, it was at the time of Magna Carta. For example, in a statute passed fifty-one years after Magna Carta, it was said that a baker, for default in the weight of his bread, "debeat amerciari vel subire judicium pillorie"; that is, ought to be amerced, or suffer the punishment, of judgment, of the pillory. Also that a brewer, for "selling ale contrary to the assize," "debeat amerciari, vel pati judicium tumbrelli"; that is, ought to be amerced, or suffer the punishment, or judgment, of the tumbrel. - 51 Henry 3, St. 6. (1266.)

Also the "Statutes of uncertain date," (but supposed to be prior to Edward III., or 1326,) provide, in chapters 6, 7, and 10, for "judgment of the pillory." - See 1 Ruffhead's Statutes, 187, 188. 1 Statutes of the Realm, 203.

Blackstone, in his chapter "Of judgment, and its Consequences," says,

"Judgment (unless any matter be offered in arrest thereof) follows upon conviction; being the pronouncing of that punishment which is expressly ordained by law." - Blackstone's Analysis of the Laws of England, Book 4, Ch. 29, Sec. 1. Blackstone's Law Tracts, 126.

Coke says, "Judicium. . . the judgment is the guide and direction of the execution." 3 Inst. 210.

17. This precedent from Germany is good authority, because the trial by jury was in use, in the northern nations of Europe generally, long before Magna Carta, and probably from time immemorial; and the Saxons and Normans were familiar with it before they settled in England.

18. Beneficium was the legal name of an estate held by a feudal tenure. See Spelman's Glossary.

19. Contenement of a freeman was the means of living in the condition of a freeman.

20. Waynage was a villein's plough-tackle and carts.

21. Tomlin says, "The ancient practice was, when any such fine was imposed, to inquire by a jury quantum inde regi dare valeat per annum, salva sustentatione sua et uxoris et liberorum suorum, (how much is he able to give to the king per annum, saving his own maintenance, and that of his wife and children). And since the disuse of such inquest, it is never usual to assess a larger fine than a man is able to pay, without touching the implements of his livelihood; but to inflict corporal punishment, or a limited imprisonment, instead of such a fine as might amount to imprisonment for life. And this is the reason why fines in the king's courts are frequently denominated ransoms, because the penalty must otherwise fall upon a man's person, unless it be redeemed or ransomed by a pecuniary fine." -Tomlin's Law Dict., word Fine.

22. Because juries were to fix the sentence, it must not be supposed that the king was obliged to carry the sentence into execution; but only that he could not go beyond sentence. He might pardon, or he might acquit on grounds of law, notwithstanding the sentence; but he could not punish beyond the extent of the sentence. Magna Carta does not prescribe that the king shall punish according to the sentence of the peers; but only that he shall not punish "unless according to" that sentence. He may acquit or pardon, notwithstanding their sentence or judgment but he cannot punish, except according to their judgment.

23. The trial by battle was one in which the accused challenged

his accuser in single combat, and staked the question of his guilt or innocence on the result of the duel. This trial was introduced into England by the Normans, within one hundred and fifty years before Magna Carta. It was not very often resorted to even by the Normans themselves; probably never by the Anglo-saxons, unless in their controversies with the Normans. It was strongly discouraged by some of the Norman princes, particularly by Henry II., by whom the trial by jury was especially favored. It is probably that the trial by battle, so far as it prevailed at all in England, was rather tolerated as a matter of chivalry, than authorized as a matter of law. At any rate, it is not likely that it was included in the "legem terrae" of Magna Carta, although such duels have occasionally occurred since that time, and have, by some, been supposed to be lawful. I apprehend that nothing can be properly said to be a part of lex terrae, unless it can be shown either to have been of Saxon origin, or to have been recognized by Magna Carta.

The trial by ordeal was of various kinds. In one ordeal the accused was required to take hot iron in his hand; in another to walk blindfold among red-hot ploughshares; in another to thrust his arm into boiling water; in another to be thrown, with his hands and feet bound, into cold water; in another to swallow the morsel of execration; in the confidence that his guilt or innocence would be miraculously made known. This mode of trial was nearly extinct at the time of Magna Carta, and it is not likely that it was included in "legem terrae," as that term is used in that instrument. This idea is corroborated by the fact that the trial by ordeal was specially prohibited only four years after Magna Carta, "by act of Parliament in 3 Henry III., according to Sir Edward Coke, or rather by an order of the king in council." - 3 Blackstone 345, note.

I apprehend that this trial was never forced upon accused persons, but was only allowed to them, as an appeal to God, from the judgment of a jury. [Hallam says, "It appears as if the ordeal were permitted to persons already convicted by the verdict of a jury." - 2 Middle ages, 446, note.]

The trial by compurgators was one in which, if the accused could bring twelve of his neighbors, who would make oath that they believed him innocent, he was held to be so. It is probable that this trial was really the trial by jury, or was allowed as an appeal from a jury. It is wholly improbable that two different modes of trial, so nearly resembling each other as this and the trial by jury do, should prevail at the same time, and among a rude people, whose judicial proceedings would naturally be of the simplest kind. But if this trial really were any other than the trial by jury, it must have been nearly or quite extinct at the time of Magna Carta; and there is no probability that it was included in "legem terrae."

24. Coke attempts to show that there is a distinction between amercements and fines - admitting that amercements must be fixed by one's peers, but claiming that fines may be fixed by the government. (2 Inst. 27, 8 Coke's reports 38.) But there seems to have been no ground whatever for supposing that any such distinction existed at the time of Magna Carta. If there were any such distinction in the time of Coke, it had doubtless grown up within the four centuries that had elapsed since Magna Carta, and is to be set down as one of the numberless inventions of government for getting rid of the restraints of Magna Carta, and for taking men out of the protection of their peers, and subjecting them to such punishments as the government chooses to inflict.

The first statute of Westminster, passed sixty years after Magna Carta, treats the fine and amercement as synonymous, as follows:

Forasmuch as the common fine and amercement of the whole county in Eyre of the justices for false judgments, or for other trespass, is unjustly assessed by sheriffs and baretors in the shires, . . . it is provided, and the king wills, that from henceforth such sums shall be assessed before the justices in Eyre, afore their departure, by the oath of knights and other honest, men, etc. - 3 Edward I. Ch. 18. (1275.)

And in many other statutes passed after Magna Carta, the terms fine and amercement seem to be used indifferently, in prescribing

the punishments for offences. As late as 1461, (246 years after Magna Carta,) the statute 1 Edward IV., Ch. 2, speaks of "fines, ransoms and amerciaments" as being levied upon criminals, as if they were the common punishments of offences.

St. 2 and 3 Philip and Mary, Ch. 8, uses the terms, "fines, forfeitures, and amerciaments" five times. (1555.)

St. 5 Elizabeth, Ch. 13, Sec. 10, uses the terms "fines, forfeitures, and amerciaments."

That amercements were fines, or pecuniary punishments, inflicted for offences, is proved by the following statutes, (all supposed to have been passed within one hundred and fifteen years after Magna Carta,) which speak of amercements as a species of "judgment," or punishment, and as being inflicted for the same offences as other "judgments."

This one statute declares that a baker, for default in the weight of his bread, "ought to be amerced, or suffer the judgment of the pillory;" and that a brewer, for "selling ale contrary to the assize," "ought to be amerced, or suffer the judgment of the tumbrell." - 51 Henry III., St. 6. (1266.)

Among the "Statutes of Uncertain date," but supposed to be prior to Edward III., (1326,) are the following:

* Chap. 6 provides that "if a brewer break the assize, (fixing the price of ale,) the first, second, and third time, he shall be amerced; but the fourth time he shall suffer judgment of the pillory without redemption."

* Chap. 7 provides that "a butcher that selleth swine's flesh measled, or flesh dead of the murrain, or that buyeth flesh of Jews, and selleth the same unto Christians, after he shall be convicted thereof, for the first time he shall be grievously amerced; the second time he shall suffer judgment of the pillory; and the third time he shall be imprisoned and make fine; and the fourth time he shall forswear the town."

* Chap. 10, a statute against forestalling, provides that,

He that is convict thereof, the first time shall be amerced, and

shall lose the thing so bought, and that according to the custom of the town; he that is convicted the second time shall have judgment of the pillory; and the third time he shall be imprisoned and make fine; the fourth time he shall abjure the town. And this judgment shall be given upon all manner of forestallers, and likewise upon them that have given them counsel, help, or favor. - 1 Ruffhead's Statutes, 187, 188. 1 Statutes of the Realm, 203.

25. 1 Hume, Appendix, 1.

26. Blackstone says, "Our ancient Saxon laws nominally punished theft with death, if above the value of twelve pence; but the criminal was permitted to redeem his life by a pecuniary ransom, as among their ancestors, the Germans, by a stated number of cattle. But in the ninth year of Henry the First, (1109,) this power of redemption was taken away, and all persons guilty of larceny above the value of twelve pence were directed to be hanged, which law continues in force to this day." - 4 Blackstone, 238.

I give this statement of Blackstone, because the latter clause may seem to militate with the idea, which the former clause corroborates, viz., that at the time of Magna Carta, fines were the usual punishments of offences. But I think there is no probability that a law so unreasonable in itself, (unreasonable even after making all allowance for the difference in the value of money,) and so contrary to immemorial custom, could or did obtain any general or speedy acquiescence among a people who cared little for the authority of kings.

Maddox, writing of the period from William the Conqueror to John, says: "The amercements in criminal and common pleas, which were wont to be imposed during this first period and afterwards, were of so many several sorts, that it is not easy to place them under distinct heads. Let them, for method's sake, be reduced to the heads following: amercements for or by reason of murders and manslaughters, for misdemeanors, for disseisins, for recreancy, for breach of assize, for defaults, for nonappearance, for false judgment, and for not making suit, or hue and cry. To them may be added miscellaneous amercements, for trespasses of divers king." - 1 Maddox's

History of the Exchequer, 542.

27. Coke, in his exposition of the words legem terrae, gives quite in detail the principles of the common law governing arrests; and takes it for granted that the words "nisi per legem terrae" are applicable to arrests, as well as to the indictment. etc. - 2 Inst., 51, 52.

28. I cite the above extract from Mr. Hallam solely for the sake of his authority for rendering the word vel by and; and not by any means for the purpose of indorsing the opinion he suggests that legem terrae authorized "judgments by defaust or demurrer," without the intervention of a jury. He seems to imagine that lex terrae, the common law, at the time of Magna Carta, included everything, even to the practice of courts, that is, at this day, called by the name of Common Law; whereas much of what is now called Common Law has grown up, by usurpation, since the time of Magna Carta, in palpable violation of the authority of that charter. He says, "Certainly there are many legal procedures, besides trial by jury, through which a party's goods or person may be taken." Of course there are now many such ways, in which a party's goods or person are taken, besides by the judgment of a jury; but the question is, whether such takings are not in violation of Magna Carta.

He seems to think that, in cases of "judgment by defaust or demurrer," there is no need of a jury, and thence to infer that legem terrae may not have required a jury in those cases. But this opinion is founded on the erroneous idea that juries are required only for determining contested facts, and not for judging of the law. In case of default, the plaintiff must present a prima facie case before he is entitled to a judgment; and Magna Carta, (supposing it to require a jury trial in civil cases, as Mr. Hallam assumes it does,) as much requires that this prima facie case, both law and fact, be made out to the satisfaction of a jury, as it does that a contested case shall be.

As for a demurrer, the jury must try a demurrer (having the advice and assistance of the court, of course) as much as any other matter of law arising in a case.

Mr. Hallam evidently thinks there is not use for a jury, except

where there is a "trial" - meaning thereby a contest on matters of fact. His language is, that "there are many legal procedures, besides trial by jury, through which a party's goods or person may be taken." Now Magna Carta says nothing of trial by jury; but only of the judgment, or sentence, of a jury. It is only by inference we come to the conclusion that there must be a trial by jury. Since the jury alone can give the judgment, or sentence, we infer that they must try the case; because otherwise they would be incompetent, and would have no moral right, to give judgment. They must, therefore, examine the grounds, (both of law and fact,) or rather try the grounds, of every action whatsoever, whether it be decided on "default, demurrer," or otherwise, and render their judgment, or sentence, thereon, before any judgment can be a legal one, on which "to take a party's goods or person." In short, the principle of Magna Carta is, that no judgment can be valid against a party's goods or person, (not even a judgment for costs,) except a judgment rendered by a jury. Of course a jury must try every question, both of law and fact, that is involved in the rendering of that judgment. They are to have the assistance and advice of the judges, so far as they desire them; but the judgment itself must be theirs, and not the judgment of the court.

As to "process of attachment for contempt," it is of course lawful for a judge, in his character as a peace officer, to issue a warrant for the arrest of a man guilty of a comtempt, as he would for the arrest of any other offender, and hold him to bail, (or, in default of bail, commit him to prison,) to answer for his offence before a jury. Or he may order him into custody without a warrant when the offence is committed in the judge's presence. But there is no reason why a judge should have the power of punishing for comtempt, any more than for any other offence. And it is one of the most dangerous powers a judge can have, because it gives him absolute authority in a court of justice, and enables him to tyrannize as he pleases over parties, counsel, witnesses, and jurors. If a judge have power to punish for contempt, and to determine for himself what is a contempt, the whole administration of justice (or injustice, if he chooses to make it so) is

in his hands. and all the rights of jurors, witnesses, counsel, and parties, are held subject to his pleasure, and can be exercised only agreeably to his will. He can of course control the entire proceedings in, and consequently the decision of, every cause, by restraining and punishing every one, whether party, counsel, witness, or juror, who presumes to offer anything contrary to his pleasure.

This arbitrary power, which has been usurped and exercised by judges to punish for contempt, has undoubtedly had much to do in subduing counsel into those servile, obsequious, and cowardly habits, which so universally prevail among them, and which have not only cost so many clients their rights, but have also cost the people so many of their liberties.

If any summary punishment for contempt be ever necessary, (as it probably is not,) beyond exclusion for the time being from the court-room, (which should be done, not as a punishment, but for self-protection, and the preservation of order,) the judgment for it should be given by the jury, (where the trial is before a jury,) and not by the court, for the jury, and not the court, are really the judges. For the same reason, exclusion from the court-room should be ordered only by the jury, in cases when the trial is before a jury, because they, being the real judges and triers of the cause, are entitled, if anybody, to the control of the court-room. In appeal courts, where no juries sit, it may be necessary - not as a punishment, but for self-protection, and the maintenance of order - that the court should exercise the power of excluding a person, for the time being, from the court-room; but there is no reason why they should proceed to sentence him as a criminal, without his being tried by a jury.

If the people wish to have their rights respected and protected in courts of justice, it is manifestly of the last importance that they jealously guard the liberty of parties, counsel, witnesses, and jurors, against all arbitrary power on the part of the court.

Certainly Mr. Hallam may very well say that “one may doubt whether these (the several cases he has mentioned) were in contemplation of the framers of Magna Carta” - that is, as exceptions to the

rule requiring that all judgments, that are to be enforced "against a party's goods or person," be rendered by a jury.

Again, Mr. Hallam says, if the word vel be rendered by and, "the meaning will be, that no person shall be disseized, etc., except upon a lawful cause of action." This is true; but it does not follow that any cause of action, founded on statute only, is therefore a "lawful cause of action," within the meaning of legem terrae, or the Common Law. Within the meaning of the legem terrae of Magna Carta, nothing but the common law cause of action is a "lawful" one.

Chapter X.

Moral Considerations For Jurors

The trial by jury must, if possible, be construed to be such that a man can rightfully sit in a jury, and unite with his fellows in giving judgment. But no man can rightfully do this, unless he hold in his own hand alone a veto upon any judgment or sentence whatever to be rendered by the jury against a defendant, which veto he must be permitted to use according to his own discretion and conscience, and not bound to use according to the dictation of either legislatures or judges. The prevalent idea, that a juror may, at the mere dictation of a legislature or a judge, and without the concurrence of his own conscience or understanding, declare a man "guilty," and thus in effect license the government to punish him; and that the legislature or the judge, and not himself, has in that case all the moral responsibility for the correctness of the principles on which the judgment was rendered, is one of the many gross impostures by which it could hardly have been supposed that any sane man could ever have been deluded, but which governments have nevertheless succeeded in inducing the people at large to receive and act upon.

As a moral proposition, it is perfectly self-evident that, unless juries have all the legal rights that have been claimed for them in the preceding chapters, - that is, the rights of judging what the law is,

whether the law be a just one, what evidence is admissible, what weight the evidence is entitled to, whether an act were done with a criminal intent, and the right also to limit the sentence, free from all dictation from any quarter, - they have no moral right to sit in the trial at all, and cannot do so without making themselves accomplices in any injustice that they may have reason to believe may result from their verdict. It is absurd to say that they have no moral responsibility for the use that may be made of their verdict by the government, when they have reason to suppose it will be used for purposes of injustice.

It is, for instance, manifestly absurd to say that jurors have no moral responsibility for the enforcement of an unjust law, when they consent to render a verdict of guilty for the transgression of it; which verdict they know, or have good reason to believe, will be used by the government as a justification for inflicting a penalty.

It is absurd, also, to say that jurors have no moral responsibility for a punishment inflicted upon a man against law, when, at the dictation of a judge as to what the law is, they have consented to render a verdict against their own opinions of the law.

It is absurd, too, to say that jurors have no moral responsibility for the conviction and punishment of an innocent man, when they consent to render a verdict against him on the strength of evidence, or laws of evidence, dictated to them by the court, if any new evidence or laws of evidence have been excluded, which they (the jurors) think ought to have been admitted in his defence.

It is absurd to say that jurors have no moral responsibility for rendering a verdict of "guilty" against a man, for an act which he did not know to be a crime, and in the commission of which, therefore he could have had no criminal intent, in obedience to the instructions of courts that "ignorance of the law (that is, of crime) excuses no one."

It is absurd, also, to say that jurors have no moral responsibility for any cruel and unusual sentence that may be inflicted even upon a guilty man, when they consent to render a verdict which they have reason to believe will be used by the government as a justification

for the infliction of such sentence.

The consequence is, that jurors must have the whole case in their hands, and judge of law, evidence, and sentence, or they incur the moral responsibility of accomplices in any injustice which they have reason to believe will be done by the government on the authority of their verdict.

The same principles apply to civil cases as criminal. If a jury consent, at the dictation of the court, as to either law or evidence, to render a verdict, on the strength of which they have reason to believe that a man's property will be taken from him and given to another, against their own notions of justice, they make themselves morally responsible for the wrong.

Every man, therefore, ought to refuse to sit in a jury, and to take the oath of a juror, unless the form of the oath be such as to allow him to use his own judgment, on every part of the case, free of all dictation whatsoever, and to hold in his own hand a veto upon any verdict that can be rendered against a defendant, and any sentence that can be inflicted upon him, even if he be guilty.

Of course, no man can rightfully take an oath as a juror, to try a case "according to law," (if by law be meant anything other than his own ideas of justice,) nor "according to the law and the evidence, as they shall be given to him." Nor can he rightfully take an oath even to try a case "according to the evidence," because in all cases he may have good reason to believe that a party has been unable to produce all the evidence legitimately entitled to be received. The only oath which it would seem that a man can rightfully take as a juror, in either a civil or criminal case, is, that he "will try the case according to his conscience." Of course, the form may admit of variation, but this should be the substance. Such, we have seen, were the ancient common law oaths.

Appendix

Taxation

It was a principle of the Common Law, as it is of the law of nature, and of common sense, that no man can be taxed without his personal consent. The Common Law knew nothing of that system, which now prevails in England, of assuming a man's own consent to be taxed, because some pretended representative, whom he never authorized to act for him, has taken it upon himself to consent that he may be taxed. That is one of the many frauds on the Common Law, and the English constitution, which have been introduced since Magna Carta. Having finally established itself in England, it has been stupidly and servilely copied and submitted to in the United States.

If the trial by jury were re-established, the Common Law principle of taxation would be re-established with it; for it is not to be supposed that juries would enforce a tax upon an individual which he had never agreed to pay. Taxation without consent is as plainly robbery, when enforced against one man, as when enforced against millions; and it is not to be imagined that juries could be blind to so self-evident a principle. Taking a man's money without his consent, is also as much robbery, when it is done by millions of men, acting in concert, and calling themselves a government, as when it is done by a single individual, acting on his own responsibility, and calling him-

self a highwayman. Neither the numbers engaged in the act, nor the different characters they assume as a cover for the act, alter the nature of the act itself.

If the government can take a man's money without his consent, there is no limit to the additional tyranny it may practice upon him; for, with his money, it can hire soldiers to stand over him, keep him in subjection, plunder him at discretion, and kill him if he resists. And governments always will do this, as they everywhere and always have done it, except where the Common Law principle has been established. It is therefore a first principle, a very sine qua non of political freedom, that a man can be taxed only by his personal consent. And the establishment of this principle, with trial by jury, insures freedom of course; because: 1. No man would pay his money unless he had first contracted for such a government as he was willing to support; and, 2. Unless the government then kept itself within the terms of its contract, juries would not enforce the payment of the tax. Besides, the agreement to be taxed would probably be entered into but for a year at a time. If, in that year, the government proved itself either inefficient or tyrannical, to any serious degree, the contract would not be renewed. The dissatisfied parties, if sufficiently numerous for a new organization, would form themselves into a separate association for mutual protection. If not sufficiently numerous for that purpose, those who were conscientious would forego all governmental protection, rather than contribute to the support of a government which they deemed unjust.

All government is a mutual insurance company, voluntarily agreed upon by the parties to it, for the protection of their rights against wrong-doers. In its voluntary character it is precisely similar to an association for mutual protection against fire or a shipwreck. Before a man will join an association for these latter purposes, and pay the premium for being insured, he will, if he be a man of sense, look at the articles of the association; see what the company promises to do; what it is likely to do; and what are the rates of insurance. If he be satisfied on all these points, he will become a member, pay his pre-

mium for a year, and then hold the company to its contract. If the conduct of the company prove unsatisfactory, he will let his policy expire at the end of the year for which he has paid; will decline to pay any further premiums, and either seek insurance elsewhere, or take his own risk without any insurance. And as men act in the insurance of their ships and dwellings, they would act in the insurance of their properties, liberties and lives, in the political association, or government.

The political insurance company, or government, have no more right, in nature or reason, to assume a man's consent to be protected by them, and to be taxed for that protection, when he has given no actual consent, than a fire or marine insurance company have to assume a man's consent to be protected by them, and to pay the premium, when his actual consent has never been given. To take a man's property without his consent is robbery; and to assume his consent, where no actual consent is given, makes the taking none the less robbery. If it did, the highwayman has the same right to assume a man's consent to part with his purse, that any other man, or body of men, can have. And his assumption would afford as much moral justification for his robbery as does a like assumption, on the part of the government, for taking a man's property without his consent. The government's pretence of protecting him, as an equivalent for the taxation, affords no justification. It is for himself to decide whether he desires such protection as the government offers him. If he do not desire it, or do not bargain for it, the government has no more right than any other insurance company to impose it upon him, or make him pay for it.

Trial by the country, and no taxation without consent, were the two pillars of English liberty, (when England had any liberty,) and the first principles of the Common Law. They mutually sustain each other; and neither can stand without the other. Without both, no people have any guaranty for their freedom; with both, no people can be otherwise than free. [1]

[1] Trial by the country, and no taxation without consent, mutu-

ally sustain each other, and can be sustained only by each other, for these reasons:

1. Juries would refuse to enforce a tax against a man who had never agreed to pay it. They would also protect men in forcibly resisting the collection of taxes to which they had never consented. Otherwise the jurors would authorize the government to tax themselves without their consent, a thing which no jury would be likely to do. In these two ways, then, trial by the country would sustain the principle of no taxation without consent. 2. On the other hand, the principle of no taxation without consent would sustain the trial by the country, because men in general would not consent to be taxed for the support of a government under which trial by the country was not secured.

Thus these two principles mutually sustain each other.

But, if either of these principles were broken down, the other would fall with it, and for these reasons: If trial by the country were broken down, the principle of no taxation without consent would fall with it, because the government would then be able to tax the people without their consent, inasmuch as the legal tribunals would be mere tools of the government, and would enforce such taxation, and punish men for resisting such taxation, as the government ordered.

On the other hand, if the principle of no taxation without consent were broken down, trial by the country would fall with it, because the government, if it could tax people without their consent, would, of course, take enough of their money to enable it to employ all the force necessary for sustaining its own tribunals, (in the place of juries,) and carrying their decrees into execution.

By what force, fraud, and conspiracy, on the part of kings, nobles, and "a few wealthy freeholders," these pillars have been prostrated in England [as in the rest of the world], it is desired to show more fully in the next volume, if it should be necessary.